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DOES EQUITY FOLLOW THE LAW OF TORTS?

An injunction is sought against conduct threatened by the defendant which, if not prevented, will cause serious harm to the plaintiff, but for which no action for damages will lie. Previous actions for damages for similar conduct by others have failed in courts of last resort on the ground that no tort to the plaintiff had been committed. May an injunction be granted nevertheless, or must equity follow the law?

I

Aequitas sequitur legem, of all the maxims of equity, is least entitled to be transformed from a concise expression of a tendency of judicial thought into a hard and fast rule. Exceptions to it are so numerous and well known that judges and text-writers¹ state it with great qualifications. This is true even of Story who, as Dean Pound has shown,² got this maxim into general circulation. Indeed, if we turn back to the first suggestion

¹ STORY, EQUITY JUR., § 64; BISPHAM, PRINCIPLES OF EQUITY (10th ed.), § 38; 1 POMEROY, EQUITY JUR. (4th ed.), §§ 425-427; CLARK, EQUITY, § 26. See also the article by R. L. McWilliams, "Equity Follows the Law," 66 CENT. L. J. 177 (1908).

² Roscoe Pound, "On Certain Maxims of Equity," in CAMBRIDGE LEGAL ESSAYS IN HONOR OF BOND, BUCKLAND AND KENNEY, 259, 270 (1926), gives the history of the maxim in detail.

of it in the English reports,³ we find Cary saying in a paraphrase of Doctor and Student:

"Conscience never resisteth the law, nor addeth to it, but only where the law is directly in itself against the law of God, or the law of Reason, for in other things, *Aequitas sequitur legem.*"

In other words, the Chancellor did not wish to disregard legal rights or add new rights to them unless he saw some strong reason for doing so. Such reluctance was natural and the following reasons for it may be suggested. First, the frequent suspicion and hostility of the common law courts and lawyers toward Chancery made it imprudent to start fresh conflicts unless the proposed departure from legal rules was demanded by a definite body of opinion or was clearly necessary to avoid serious injustice. Secondly, the adoption of legal rules and analogies was doubtless due in part to that economy of effort, sometimes degenerating into pure laziness, which often leads human beings to adopt old models of political or social organization to meet a new situation rather than go to the trouble of working out an entirely novel scheme. Such a mental attitude may explain the acceptance by equity in comparatively recent times, when the antagonism of the common law bar was much weaker, of the Hearsay Rule and other rules of Evidence,⁴ although these were safeguards for the determination of issues of fact by a jury and so were not needed in Chancery. It was easier for the Chancellor to follow the law courts than to elaborate his own rules of admissibility. Thirdly, wherever the two sides of Westminster Hall took different or conflicting views of the same facts, uncertainty and confusion would follow,⁵ a result not to be incurred on slight grounds. Consequently, while Chancery would willingly afford new remedies to enforce existing primary rights, which were not

³ CARY, 15, 16 (1820 ed.; Cary was first published in 1650, and covers 1557-1604).

⁴ 1 WIGMORE, EVIDENCE (2d ed.), § 4 (1923).

⁵ Jekyll, M. R., *Cowper v. Cowper*, 2 P. Wms. 720, 753 (1753): "The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates, otherwise great uncertainty and confusion would ensue."

adequately safeguarded at law, a wise Chancellor would be slow either to abrogate such existing primary rights by his interference or to add to their number, and when a change was made he would follow the legal system as closely as the accomplishment of his purpose permitted in order to avoid antagonism and confusion so far as possible.

Thus in the redemption of mortgages, the protection of the married woman's separate estate, and the creation of uses, equity obviously did not follow the law, whether we say with Hohfeld⁶ that it actually conflicted with it or with Maitland⁷ that it merely supplemented the law. Here it acted to avoid great injustice or to respond to strong social and economic needs. Yet the moulding of new equitable interests so that they possessed most of the incidents of the corresponding legal estates is the best known application⁸ of the maxim, *Aequitas sequitur legem*. The purpose of uses was to shift the whole system of landed property into a region where it could be free from burdensome feudal duties, subject to wills, and protected from forfeitures for treason,⁹ but not to change the essential qualities of the system itself. The new system became a sort of looking-glass world which corresponded to the legal world almost point for point except in the features mentioned in the preceding sentences, which uses had been created to avoid. It is shrewdly observed in Doctor and Student¹⁰ that "conscience" affords no reason why land should descend to the eldest son by primogeniture in most regions, and elsewhere to the youngest son by Borough English or to all the children by gavelkind, but it was merely by reason of divers customs, which equity, like the law, found it convenient to follow. Confusion and antagonism would have resulted from the attempt

⁶ "The Relations Between Equity and Law," 11 MICH. L. REV. 537 (1913), reprinted in his FUNDAMENTAL LEGAL CONCEPTIONS, 115 (1923).

⁷ LECTURES ON EQUITY, 16-18 (1909), reprinted in HOHFELD, *op. cit.*, 119. See also the extracts from Langdell reprinted, *ibid.*, 120; R. L. McWilliams, *op. cit.*, note 1.

⁸ 1 POMEROY, EQUITY JUR. (4th ed.) § 426; Cowper v. Cowper, *supra*, note 5; Hopkins v. Hopkins, West temp. Hardw. 606, 619 (1738).

⁹ Austin W. Scott, "The Trust as an Instrument of Law Reform," 31 YALE L. J. 457, 460 ff (1922).

¹⁰ Dial. I, c. 20.

to bring uses everywhere under a uniform and reasonable rule of inheritance like gavelkind—though perhaps the justice of this rule was less obvious in the sixteenth century than to us. Even the obviously irrational exclusion of the half-blood was followed in equity.¹¹ Economic and political factors and expediency, rather than reason and conscience, will explain many of the adoptions of legal analogies, as well as some departures from them like the long-continued refusal to give dower in equitable estates to widows, who could neither vote nor fight.¹² This unfair discrimination has been removed by statute, so that equity now follows the law as to dower.

In the exclusive jurisdiction of equity, therefore, where the Chancellor created new rights¹³ not enforceable at law, the maxim under consideration can only mean that the incidents of these equitable rights were sometimes patterned after legal analogies when the various factors operating on the decisions of Chancery did not induce the introduction of principles altogether different. It is obvious that the maxim thus phrased is of practically no aid in ascertaining the qualities of a given equitable right, since one must first determine those qualities from actual examination of the decisions and texts before he can say whether legal analogies were or were not applied in the particular case. With respect to equitable rights, then, *Aequitas sequitur legem* is only a brief and inaccurate description of what sometimes happens and oftener does not. The maxim is not at all a reason for decisions. Consequently these cases on the exclusive jurisdiction supply a very dubious basis for the application of the maxim to the concurrent jurisdiction of injunctions against torts.

When equity is dealing with legal rights, *i. e.*, the class of rights enforced in the law courts, as by injunctions against torts, specific performance of contracts, creditors' bills, etc., there is more room for the application of the maxim. Equity would in-

¹¹ *Cowper v. Cowper*, *supra*, note 5.

¹² See Scott, *op. cit.*, note 9, at page 465, stating that this rule was not due to the absence of women from the woosack, but either to *stare decisis* or to the recognition of dower as a nuisance, restraining the alienation of land.

¹³ "Rights" is used in this article in the broad sense to include all the conceptions which Hohfeld calls rights, powers, privileges and immunities.

need nullify legal contract rights where strong reasons existed, *e. g.*, by cancelling a specialty for fraud before this became a defense at law, an exercise of exclusive jurisdiction. However, in the absence of such well-established unconscionable grounds for defense or affirmative relief, a legal right will normally possess the same incidents in whichever court it is invoked, except that Chancery will afford its own remedies for the enforcement and will insist on the inadequacy of legal remedies. *Per contra*, if a legal right be denied by the law courts to exist on the facts, the equity courts are unlikely to create a right for the purpose of protecting it by remedies ordinarily used for legal rights.

Equity is even more likely to follow the law in these fields when the same court administers both law and equity.¹⁴ The same judges familiar with a single body of precedents do not naturally develop two distinctly different attitudes toward the same subject-matter. And as legislation becomes an extensive factor in creating or modifying rights, the probability increases that the rules of determining tort or contract liability will be the same in suits at law and in equity, because a legislature is not interested to make new distinctions in primary rights dependent merely on the form of the action. On the contrary, legislation inclines to wipe out old distinctions, *e. g.*, by allowing equitable defenses to be set up in actions at law. Perhaps the law may here be said to follow equity, rather than the reverse, but the general effect of statutes is to bring about a uniform system of primary rights.¹⁵ The remedies available continue, of course, to vary with the form of action or (in Code states) with the presence or absence of a jury, but the tests which determine whether

¹⁴ Good examples in this country are *Magniac v. Thomson*, 15 How. 281 (1853), a judgment discharged at law by release of the defendant from civil arrest will not be revived in equity; *Hedges v. Dixon County*, 150 U. S. 182 (1893), county bonds void at law for want of authority will not be enforced in equity; *Hayes v. Schall*, 229 Mo. 114, 129 S. W. 222 (1910), in a suit to quiet title a defendant relying on his legal title is not subject to laches or to the maxim, he who seeks equity must do equity.

¹⁵ Instances are *Rambo v. First State Bank*, 88 Kan. 257, 128 Pac. 182 (1912), under § 132 of the Negotiable Instruments Law requiring acceptances, a drawee cannot be held liable upon equitable estoppel by oral acceptance; *Scott v. Waynesburg Brewing Co.*, 256 Pa. 158, 100 Atl. 591 (1917), a judgment lien which by statute lost its priority through lapse of time will not be effectual in equity after appointment of a receiver for the debtor.

contract liability or tort liability exists tend today to be the same whether the plaintiff seeks damages or specific relief.

Taken in this sense, the maxim, "Equity follows the law," possesses great vigor. Though the cases discussing or stating it are comparatively few, there can be little doubt of its influence on the judicial mind even when not expressed. When the defendant's conduct, actual or threatened, would not give rise to an action for damages for breach of contract or tort, the plaintiff who seeks equitable relief in the nature of specific performance or a tort injunction must prepare to overcome a deep-seated reluctance in the court. As to contracts, something will be said later for purposes of comparison, but we must now turn to our main problem as presented at the opening of this article, and ask whether tort liability in damages does or should furnish an invariable test for injunctions against torts.

II

The tort problem will be made clearer if we start with a specific controversial situation. This can be discussed in connection with a survey of established principles. Then we can proceed to the discussion of some other controversial situations.

A young woman has been receiving marked attention from a man whom she dislikes. When she refuses to see him, he sends her letters although she requests him to desist. The letters are annoying, insulting and defamatory.¹⁶ The police decline to act. She has no remedy at law, for the man's conduct does not constitute libel in the absence of publication,¹⁷ and her mental anguish does not, in this jurisdiction, at least, entitle her

¹⁶ The story of Antoinette in ROMAIN ROLLAND'S *JEAN-CHRISTOPHE* contains an incident which brings out forcibly the suffering caused a woman by such letters.

¹⁷ Pound's edition of AMES & SMITH, *CASES ON TORTS*, 656 note. Pound, "Interests of Personality," 28 HARV. L. REV. 445, 448 (1915), points out that the requirement of publication is an attempt to deal with defamation injurious to personality by tests suitable to the notion of reputation as an interest of substance, and that the Roman Law omits the requirement where personality is involved. Even common law courts will struggle to find publication in a strained sense in cases which obviously call for relief. Dean Pound cites a decision to this effect by Pound, C., *Schmuck v. Hill*, 2 Neb. Unoff. 79 (1901).

to sue for damages.¹⁸ Unless she can obtain an injunction, she must endure an indefinite continuance of the correspondence. May equitable relief be granted?

While her suit meets the initial obstacle that it involved only an interest of personality, the weakness of limiting equitable jurisdiction to property has been repeatedly demonstrated,¹⁹ and we will assume that an injunction will not be denied on this ground. But many of the cases denying protection to interests of personality may be explained by the absence of a legal right.²⁰ For instance, in *Roberson v. Rochester Folding Box Co.*,²¹ Parker, C. J., said, in refusing an injunction and damages for invasion of privacy:

"I have gone far enough to barely suggest the vast field of litigation which would necessarily be opened up should this court hold that privacy exists as a legal right enforceable in equity by injunction, and by damages when they seem necessary to give complete relief. . . . It is undoubtedly true that in the early days of Chancery jurisdiction in Eng-

¹⁸ *Spade v. Lynn & Boston R. Co.*, 168 Mass. 285, 47 N. E. 88 (1897), Pound's edition of AMES & SMITH, CASES ON TORTS, 51 n., 59 n.; *Murray v. Gast Lithog. & Eng. Co.*, 8 Misc. Rep. 36, 28 N. Y. Supp. 271 (1894), suit to enjoin publication of picture of the plaintiff's daughter and obtain damages. The authorities are of course divided, and a letter written with deliberate intention to cause mental anguish might be actionable under *Wilkinson v. Downton*, [1897] 2 Q. B. 57. See cases cited in notes to Pound's edition, *supra* 51-65; F. H. Bohlen, "Right to Recover for Injury Resulting from Negligence without Impact," 41 AM. L. REG. (N. S.) 141 (1902), reprinted in his COLLECTED ESSAYS.

¹⁹ Roscoe Pound, "Equitable Relief against Defamation and Injuries to Personality," 29 HARV. L. REV. 640 (1916); Joseph R. Long, "Equitable Jurisdiction to Protect Personal Rights," 33 YALE L. J. 115 (1923). See also 37 L. R. A. 783 n.; 14 A. L. R. 295 n.

²⁰ Pound, *op. cit.*, *supra*, note 19, at 669: "The crucial question in such a case as *Chappell v. Stewart* [82 Md. 323, 33 Atl. 542 (1896)] is as to the legal right. . . . It is significant that all but one of the cases in accord with *Chappell v. Stewart* deny the legal right." He cites *Atkinson v. Doherty Co.*, 121 Mich. 372, 80 N. W. 285 (1899); *Roberson v. Rochester Folding Box Co.*, *infra*, note 21; *Woolcott v. Shubert*, *infra*, note 22. See also *Murray v. Gast Lithog. & Eng. Co.*, *supra*, note 18; *Hodecker v. Stricker*, 39 N. Y. Supp. 515 (1896) and Pound's comment, *op. cit.*, 673. It is interesting to note that shadowing by detectives, the act involved in *Chappell v. Stewart*, has been held a tort at law in *Schultz v. Frankfort*, 151 Wis. 537, 139 N. W. 386 (1913). Pound, *op. cit.*, at 644, points out that Lord Eldon in *Gee v. Pritchard*, 2 Swans. 402 (1818), did not base his decision on the right of privacy since no such legal tort then existed. Long, *op. cit.*, *supra*, note 19, at 123-125, takes the same position, and cites *Hoyt v. Mackenzie*, 3 Barb. Ch. 320 (1848) as denying protection to letters of no literary value "because there was no legal right at all."

²¹ 171 N. Y. 538, 64 N. E. 442 (1902). *Accord*, *Henry v. Cherry*, 30 R. I. 13, 18, 73 Atl. 97 (1909).

land the Chancellors were accustomed to deliver their judgments without regard to principles or precedents, and in that way the process of building up the system of equity went on, the Chancellor disregarding many established principles of the common law. [But this period has passed.] . . . So in a case like the one before us, which is concededly new to this court, it is important that the court should have in mind the effect upon future litigation and upon the development of the law which would necessarily result from a step so far outside of the beaten paths of both common law and equity, assuming . . . that the right of privacy as a legal doctrine enforceable in equity has not, down to this time, been established by decisions."

And in *Woolcott v. Shubert*,²² Scott, J., in refusing to enjoin the exclusion of the plaintiff from a theatre, said:

"The same rule thus applied to an action for damages on the case must equally apply to an action for an injunction, for the right to an injunction depends upon the necessity for preventing a legal injury from which damages may result, and if plaintiff can establish no case for claiming damages, he can show no ground for an injunction."

In short, there are two objections to equitable protection of many interests of personality: (1) equity deals only with property; (2) equity follows the law. Even a court which was willing to overcome the first objection and to enjoin such established injuries to personality as defamation or false imprisonment, might still refuse on the second ground to act in cases where damages were not recoverable, as in the suggested situation of undesired correspondence. It is my conclusion, however, that this second ground of decisions like *Roberson v. Rochester Folding Box Co.*²³ is as unsound as the first, and that once equity courts decide to protect interests of personality against serious injury they should do so regardless of the defendant's liability at law. Despite the already mentioned natural tendency of courts to make tort liability or non-liability the same in equity and at law, I believe that reasons for differentiation exist in certain situations,

²² 169 App. Div. 194, 198, 154 N. Y. Supp. 643, 646 (1915).

²³ *Supra*, note 21.

and that ample support for such differentiation where it is demanded by the facts can be found in the authorities.

III

Leaving aside for the moment the specific topic of interests of personality not actionable at law, we may proceed to examine in some detail the general field of equitable relief against torts to property so as to ascertain how far the maxim *Aequitas sequitur legem* actually prevails there. Reasons have already been urged for the probability that its application to torts will be less partial and arbitrary than to purely equitable rights like uses, but we must now turn from *a priori* arguments to the facts.

At the outset it may be suggested that equity cannot follow the law unless there is law to follow. In other words, the different kinds of torts may be roughly grouped according to the extent to which they have been well defined by the law courts before equitable jurisdiction over them began to be systematically exercised. As to some specific torts, the limits of liability had been thoroughly worked out by law courts before Chancery began to deal with them. Under such circumstances the Chancellor, for reasons already indicated, was somewhat unlikely to adopt a different definition of that very tort. Thus the tests which equity applies in determining whether a trespass, a disseisin, or a nuisance exists, are the tests previously established at law.²⁴ And so if equity should ever grant injunctions in this country as it does in England against slander, libel and disparagement of property,²⁵ we should naturally expect it to take over bodily the various de-

²⁴ Jessel, M. R., *Cooper v. Crabtree*, L. R. 20 Ch. D. 589, 592 (1882, C. A.): "What he asks for is an injunction to restrain the trespass, though he cannot maintain an action for trespass. No authority has been cited for such a proceeding; nor do I know of any."

Kindersley, V. C., *Soltau v. DeHeld*, 2 Sim. N. S. 133, 151 (1851): "Equity will only interfere, in case of nuisance, where the thing complained of is a nuisance at law; there is no such thing as an equitable nuisance."

The use of "trespass" by equity lawyers to extend to similar injuries to land by a defendant in possession, i. e., a disseisor, is a difference in terminology rather than in fact. The word merely covers two legal torts, trespass and disseisin.

²⁵ Roscoe Pound, *op. cit.*, *supra*, note 19; W. D. Lewis, "English Cases on the Restraint of Libel, etc.," 42 AM. L. REG. (N. S.) 322 (1903). Disparagement of title is a special matter, discussed, *infra*, p. 23.

fenses to actionable defamation which have developed at law during the nineteenth century. Such has been the English practice.²⁶

To this identity in treatment there is one conspicuous exception, all the more significant because it was the first tort to be frequently considered in Chancery, namely, waste. In several ways equity refused to follow the law of waste. As the law courts interpreted the Statute of Gloucester,²⁷ if the limitations upon land were A for life, B for life, C in fee, and A committed waste, neither B nor C could maintain an action of waste against A because neither had an immediate estate of inheritance.²⁸ Yet both C²⁹ and B³⁰ could enjoin A in Chancery. Several explanations of this equitable relief may be suggested. (1) It is arguable that Chancery was really following the law courts since, although neither remainderman could maintain a writ of waste, C could maintain trover and B an action on the case for waste. It is very doubtful, however, if they possessed these alternative remedies when the equitable jurisdiction was developing.³¹ (2) Equity may have been creating a new equitable wrong like breaches of trust, and not enforcing a legal right at all. This view is analytically inadequate. Unlike the *cestui que trust*, both

²⁶ *Bonnard v. Perryman*, [1891] 2 Ch. 839 (C. A.), libel; *White v. Mellin*, [1895] A. G. 154, disparagement of property, especially *Herschell, L. C.*, 854: "The plaintiff would not be entitled to an injunction any more than he would be entitled to maintain an action unless he established all that was necessary to make out that a tort had been committed."

²⁷ 6 Edw. I, c. 5 (1278).

²⁸ Co. Lit. 53 b.

²⁹ *Anon.*, Moore, 554, pl. 748 (1599), citing a precedent in 5 Richard II.

³⁰ *Mollineux v. Powell*, 3 P. Wms. 268 n. (F.) (1730), apparently stating an old rule.

³¹ As late as 1680, Lord Nottingham referred to trover as a new remedy. *Abrahall v. Bubb*, Freem. Ch. 53, 54 (1680); but an action of trover was maintained in 1621, *Berry v. Heard*, Cro. Car. 242. Perhaps the action was too infrequent for Nottingham to regard it as old. Anonymous, *supra*, note 29, does not refer to trover, but says A "is punishable by the common law." The action on the case arose for ordinary remaindermen and reversioners much earlier, about 1400. G. W. Kirchwey, "Liability for Waste," 8 COL. L. REV. 425, 624 (1908). But C was barred by the intervening life estate and B's right to sue on the case appears to have been doubtful in 1596. *Jeremy v. Lowgar*, Cro. Eliz. 461.* *Mollineux v. Powell*, *supra*, note 30, does not mention actions on the case, but only B's inability to maintain a writ of waste under the statute. 7 HOLDSWORTH, HISTORY OF ENGLISH LAW, 279, 280, thinks that it was B's remedy in equity which influenced the law courts to allow him to sue on the case.

B and C have legal estates, of which the *jus fructu* protected by the injunction seems to be a legal incident. A's conduct is precisely the same in fact as ordinary legal waste. Furthermore, A's waste is shown to have been a legal tort to C by the fact that C could bring an action of waste against A if B's mesne remainder lapsed by his death or surrender.³² *Roswell's Case* expressly states,³³ "Coment que il nest punishable durant le continuance del remaynder, uncore ceo est un tort et est punishable apres." (3) This extract indicates the correct view. A's waste was a legal tort to B and to C, but the legal machinery of the writ of waste afforded no remedy until after B's estate lapsed, perhaps because of the technicality of law judges in limiting the writ, but more probably because the statutory remedy at law was unfitted to cover this particular situation. B could not sue because he ought not to recover thrice the amount of the waste, most of which should properly go to C. C could not sue because forfeiture of the estate to him would unfairly cut off B. Both could not sue jointly. Hence the law court left the legal tort alone unless B's death or surrender simplified matters. Equity, however, could handle the tort since its machinery involved no such difficulties. It was a case of a legal tort without a legal remedy.

This conception of a right existing at law but not protected by the law courts may seem fanciful. Justice Holmes dismissed a somewhat analogous theory with the comment:³⁴

³² Co. Lit. 54 a; 1 Ames Cases on Equity Jur., 467 n.

³³ 1 Roll. Ab. 377, pl. 13 (1619).

³⁴ *The Western Maid*, 257 U. S. 419, 433, *sub. nom.* U. S. v. Thompson, 42 Sup. Ct. 159, 161 (1922), rejecting the contention that a tort could be committed by a government vessel so as to subject it to a maritime lien as soon as it returned into private ownership. See the adverse comment on this decision by Judge C. M. Hough in "*Admiralty Jurisdiction—of Late Years*," 37 HARV. L. REV. 529, 541 ff. (1924), and by E. M. Borchard, 31 YALE L. J. 879 (1922). And in *Luckenbach S. S. Co. v. The Thekla*, 266 U. S. 328, 45 Sup. Ct. 112 (1924), the United States by libelling a vessel after a collision was held to subject the government vessel to a cross libel. This would indicate that the government vessel committed a tort although no remedy existed until the United States began suit. Mr. Justice Holmes, however, denied the existence of "legal liability" but said that a "moral claim" of the defendant was recognized. It may be suggested that a non-existent legal liability which is recognized by the courts is even more spooky than one which exists but is temporarily ignored. See 38 HARV. L. REV. 678 (1925), on the difficulty of reconciling these two decisions.

"Legal obligations that exist but cannot be enforced are ghosts that are seen in the law, but that are elusive to the grasp."

This scepticism may perhaps be dissipated when other similar situations are shown to have existed contemporaneously with these legal limitations upon the writ of waste. W. T. Barbour's "History of Contract in Early English Equity,"³⁵ in discussing the common law actions, presents a long list of situations where "theoretically the law provides a remedy, but it fails in the particular case." Thus he mentions six instances of this arising from difficulties of pleading or proof: (1) transactions out of England, since the venue must be laid at law in some English county; (2) action against a feme covert; (3) actions by one partner or executor against another; (4) loss of an obligation, or its theft or destruction, which defeated the common law remedy; (5) assignment of a chose in action; (6) actions against personal representatives, who were not "liable for the debt of the deceased unless it were proved by a deed." This last instance is paralleled in torts, where an action for waste or trespass abated at law by the death of the defendant, yet his representative was held accountable in equity for the proceeds.³⁶ Was not equity here enforcing a legal right where legal remedies had ceased? We must also remember that in the early days of the King's law courts rights could not necessarily be enforced there but might be left to the local courts. Thus Maitland writes to Vinogradoff:³⁷

"Has this occurred to you?—how extremely different the whole fate of English land law would have been if the King's court had not opened its doors to the undervassals, to the lowest freeholders. . . . There will be a tendency among your readers to say *of course* freeholders had remedies in the King's courts while really there is no of course in the matter. The point that I should like to see emphasized . . . is that not having remedies in the King's own court is not equivalent to not having rights."

³⁵ 4 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY, ed. Vinogradoff, I, at 56, also at 70, 98 ff.

³⁶ Bishop of Winchester v. Knight, 1 P. Wms., 406 (1717), and additional authorities cited in CHAFFEE, CASES ON EQUITABLE RELIEF AGAINST TORTS, 247 note.

³⁷ September, 1888; in H. A. L. FISHER'S F. W. MAITLAND, 46 (1910). The italics are Maitland's.

Similar to the situation of the intervening life-estate are several other cases³⁸ where equity protects from waste trustees to preserve contingent remainders, contingent remaindermen in fee, executory devisees, and owners of an *interesse termini*. Many of these decisions are recent. The estates or interests of all these persons are created by law courts, so that the rights seem clearly legal, but the law gives no remedy of damages, probably because the injury to such partial and contingent interests would be very hard to calculate.³⁹ Certainly, the writ of waste with its treble damages was wholly unsuited. The expectant legal estate of a child *en ventre sa mere*, who could not sue at law, is safeguarded by injunctions against waste.⁴⁰ One decision protects inchoate dower.⁴¹ A co-tenant can enjoin waste by his associate and secure an accounting in equity, although his legal right is safeguarded at law only by an obsolete partition proceeding.⁴²

The outstanding factor in all the waste situations already discussed, in which equity does not follow the law, is the unfitness of the legal machinery to deal with the wrong in question. Chancery, on the other hand, has the machinery and uses it. No

³⁸ These are collected in CHAFEE, CASES ON EQUITABLE RELIEF AGAINST TORTS, 17 note.

³⁹ No case has been noted where the owner of such an interest recovered damages, and recovery was denied in *Taylor v. Adams*, 93 Mo. App. 277 (1902), contingent remainderman. See *Gordon v. Lowther*, 75 N. C. 193 (1873), accounting refused in equity to executory devisee; cf. *Bender v. Bender*, 292 Ill. 358, 127 N. E. 22 (1920). See also CHAFEE, *op. cit.*, 18 n.¹ on the need of joining the remainderman in fee when the intervening life tenant seeks an accounting in equity from the first life tenant.

⁴⁰ *Lutterel's Case*, Prec. in Ch. 50 (1670); CHAFEE, *op. cit.*, note 38, *supra*, 18 n.².

⁴¹ *Brown v. Brown*, 94 S. C. 492, 78 S. E. 447 (1913). See 28 HARV. L. REV. 615 (1915); CHAFEE, *op. cit.*, 30, 33 n.

⁴² Doctor & Student, Dial I. c. 19: "If two men have a wood jointly, and the one of them felleth the wood, and keepeth all the money wholly to himself: In this case his fellow shall have no remedy against him by law, for as they when they took the wood jointly, put each other in trust, and were contended to occupy together; so the law suffereth them to order the profits thereof according to the trust that each of them put the other in. And yet if one took all the profits, he is bound in conscience to restore the half to his fellow, for as the law giveth him right only to half the land, so it giveth him right only in conscience to the half profits."

It will be noted that this passage makes no reference to the Statute of Westminster II, 13 Edw. I, c. 22 (sess. 10, c. 6), which gave a remedy of partition in which the wasted part was set off to the waster. The equity cases are collected in CHAFEE, *op. cit.*, 33, 34 n.

body suggests that because the law courts are incapable of acting, equity is bound to do nothing. If *Aequitas sequitur legem* were an essential principle we should expect to find some reference to it in these early waste cases. But the Chancellor instead of stating that he is following the law courts, says just the opposite, that he is acting because they do not.⁴³ He stands equally ready to prevent waste, whether there is an inadequate legal remedy or no legal remedy at all.⁴⁴

Another group of waste cases wholly inconsistent with the maxim is represented by the *Bishop of Winchester's Case*,⁴⁵ where an injunction was granted against a tenant without impeachment of waste who was committing outrageous waste, although no action of any sort lay against him at law.⁴⁶ Four explanations of the doctrine of "equitable waste" have been suggested.

(1) Equity acts because it is against the public good for the tenant to destroy the timber or the manor house.⁴⁷ This reason is clearly unsound. It does not lead equity to act against an owner in fee, who may strip the land and sow it with salt, committing, as Blackstone says,⁴⁸ "whatever waste his own indiscretion may permit him to." No public good could be served by Lord Eldon's willingness to preserve yew trees cut by a settlor into the shape of peacocks,⁴⁹ and indeed the community might sometimes benefit affirmatively by equitable waste, *e. g.*, through the circulation of timber for shipping.⁵⁰ Equity in private suits

⁴³ *Supra*, notes 29, 30.

⁴⁴ CHAFEE, *op. cit.*, 8. Similarly the discussion by BARBOUR, *op. cit.*, *supra*, note 35, shows no evidence of the application of the maxim in early contract cases, but quite the contrary.

⁴⁵ *Accord*, 1 Rolle Ab. 380 (T, 3), cutting down all the timber. *Vane v. Lord Barnard*, 2 Vern. 738 (1716), wrecking a castle. For other cases see CHAFEE, *op. cit.*, 18 n.; 1 AMES, CASES ON EQ. JUR. 469 n.

⁴⁶ *Lewis Bowles' Case*, 11 Coke 82 b (1616). For a discussion of the legal authorities, see CHAFEE, *op. cit.*, 19.

⁴⁷ *Bishop of Winchester's Case*, *supra*, note 45; *Nottingham in Abrahall v. Bubb*, Freem. Ch. 53 (1680); but see his objection to this view in *Skelton v. Skelton*, 2 Swans. 170 (1677), that the equitable waste need tend "only to a private damage."

⁴⁸ 3 COMMENTARIES 223.

⁴⁹ *Wombwell v. Belasyse*, 6 Ves. 110a, note (1825).

⁵⁰ See *Packington's Case*, 3 Atk. 215 (1744); *Gannon v. Peterson*, 193 Ill. 372, 62 N. E. 210 (1901).

is not primarily protecting public and social interests, but the private interests of the plaintiff.⁵¹ Social interests may be incidentally advanced by an injunction against equitable waste, but the same is true of any other tort injunction. The conservation of natural resources as such must be secured in a proceeding by the state.⁵² As much social harm is caused by the destructiveness of an ordinary tenant in tail or a jointress in tail, who can not be enjoined,⁵³ as by that of a tenant in tail after possibility of issue extinct, who is liable.⁵⁴ Any such distinction must rest, not on economic welfare, but on the nature of ownership of the waster.

(2) It has been suggested by Cowper, C., and Leach, V. C.,⁵⁵ that this jurisdiction of equity is based on a trust. The tenant is a fiduciary and in this instance violates the trust that he was to use his legal estate only for the purpose of fair enjoyment. Equity enjoins this breach of trust. On this theory it need not follow the law, because it is exercising a well-established branch of the exclusive jurisdiction. However, this ingenious theory is open to several objections. (a) Where do we find the duties of the alleged trustee? The usual place is the trust instrument, but the deed or will which makes him a life-tenant states that he is to be without impeachment for waste. Evidently we must go outside the instrument in any event to construe it, so that calling him a trustee does not help us in the least to explain the limitation on his powers. (b) A trustee who assigns his interest and duties commits a breach of trust, but the tenant for life without impeachment for waste has the same unrestricted powers of aliena-

⁵¹ Skelton v. Skelton, *supra*, note 47; Perrot v. Perrot, 3 Atk. 94, 95 (1744).

⁵² Such a proceeding would ordinarily be criminal, although modern legislation might render the landowner's wastefulness a public nuisance subject to equity. State v. Ohio Oil Co., 150 Ind. 21, 49 N. E. 809 (1897); writ of error dismissed, 177 U. S. 190 (1899).

⁵³ Savile's Case, Cas. temp. Talbot, 16 (ca. 1725); Skelton v. Skelton, *supra*, note 47.

⁵⁴ Abrahall v. Bubb, *supra*, note 47; Williams v. Day, 2 Cas. in Ch. 32 (1680).

⁵⁵ Bishop of Winchester v. Knight, *supra*, note 36; Ormonde v. Kyndersley, 5 Madd. 369 (1820). *Accord*, Smith v. Daniel, 2 McC. Ch. 143, 149 (1827), ordinary life-tenant of chattels, where special considerations as to future interests exist. See J. C. Gray, RULE AGAINST PERPETUITIES, § 789 ff. But the remainderman's interest is legal. *Ibid.*, § 849.

tion as any other freeholder.⁵⁶ (c) An ordinary tenant who buys in an outstanding interest can keep it for himself, unlike a trustee.⁵⁷ (d) A trustee who commits a breach of trust in collusion with an outsider may repent and recover the trust property from the latter,⁵⁸ but a tenant who makes a sublease permitting waste cannot himself disaffirm it against the sublessee.⁵⁹ (e) A *cestui que trust* sues the trustee in equity to recover the proceeds of a breach of trust, even when no injunction is sought, but a lessor cannot have an accounting for waste in equity from an ordinary tenant unless he is also entitled to an injunction.⁶⁰ In short, an ordinary tenant is not a trustee, and this is all the truer of the more independent tenant without impeachment for waste.⁶¹ No real fiduciary relation exists. He holds his life-estate for his own benefit within its limits, and outside those limits he is responsible for wrongdoing like any other tortfeasor, except that his liability is in equity. The remainderman is not a *cestui que trust* with an equitable interest in property to which another has legal title; he himself is legal owner, and it is his legal title which equity protects, although the law courts lend him no aid.

(3) An explanation more generally accepted was suggested by Nottingham,⁶² and amplified thus by Mitford:⁶³

"In these cases it should seem that the courts have proceeded on the ground that the acts done were an unconscientious use of the powers given to the particular tenant."

Turner, *L. J.*, states it still more fully:⁶⁴

"This doctrine of equitable waste . . . is . . . an

⁵⁶ *Kingham v. Lee*, 15 Sim. 396, 399 (1846); *Powys v. Blagrave*, Kay 495, 501 (1854).

⁵⁷ *Hodgen v. Guttery*, 58 Ill. 431, 438 (1871).

⁵⁸ *Wetmore v. Porter*, 92 N. Y. 76 (1883); SCOTT, CASES ON TRUSTS, 650 n.

⁵⁹ *Wentworth v. Turner*, 3 Ves. Jr. 3 (1795).

⁶⁰ *Jesus College v. Bloom*, Amb. 54 (1745); CHAFEE, CASES ON EQUITABLE RELIEF AGAINST TORTS, 249 n.

⁶¹ *Kingham v. Lee*, *supra*, note 56, states that Leach's suggestion of a trust was only metaphorical. In some cases the tenant is an express trustee. *Robinson v. Litton*, 3 Atk. 209 (1750); *Marker v. Marker*, 9 Hare 1, 18 (1851).

⁶² *Skelton v. Skelton*, and *Abrahall v. Bubb*, *supra*, note 47.

⁶³ PLEADINGS IN CHANCERY (3d ed.) 113 (1814).

⁶⁴ *Micklethwait v. Micklethwait*, 1 DeG. & J. 504, 524 (1857).

encroachment upon a legal right.⁶⁵ At law a tenant for life without impeachment of waste has the absolute power and dominion over the timber upon the estate, but this court controls him in the exercise of that power, and it does so . . . upon this ground, that it will not permit an unconscientious use to be made of a legal power."

Historically this view represents a correct statement of what actually happened, a conflict between the courts of law and of equity, although we may perhaps share Jessel's objection to "encroachment" as "a term of opprobrium when it ought to be a term of praise" inasmuch as "almost all the doctrines of equity were interferences with a legal right."⁶⁶ Analytically, however, this explanation does not meet the needs of the present day when we have one system of courts. To use a right wrongfully seems a contradiction in terms. We cannot consistently say that the same act is rightful at law and wrongful in equity. If the tenant really has a legal power to strip the land of ornamental timber, is doing so an equitable wrong?

(4) The sound explanation is given by Langdell⁶⁷ in his criticism of the preceding view:

"An equity judge administers the same system of law that a common-law judge does; and he is therefore constantly called upon to decide legal questions. It, therefore, sometimes happens that courts of equity and courts of common law declare the law differently; and a consequence of this may be that courts of equity will recognize a certain right

⁶⁵ HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS*, 153, analyzes the tenant's legal right as a "legal privilege," since he cannot be sued at law. In addition, he is considered by the law courts to have what Hohfeld calls a power, inasmuch as they will not hold him accountable for what ornamental timber he cuts. But the tenant in the case of the intervening life estate, *supra*, page 10, has in the law courts only a privilege and no power, inasmuch as he is liable in trover to the remainderman in fee. See *Skelton v. Skelton*, *supra*, note 47. Neither tenant had a Hohfeldian "right" to commit waste, since there was no correlative duty. Following Langdell's reasoning, page 18, *infra*, I should say that the tenants had not a legal power or privilege, but the law courts mistakenly thought they had.

⁶⁶ *Baker v. Sebright*, 13 Ch. D. 179, 185, 186 (1879). Jessel makes use of Turner's explanation of equitable waste in one passage of his opinion, but later on adopts the fourth explanation: "The Court of equity considers that where the testator gives these powers to the tenant for life, he intends them to be used fairly."

⁶⁷ *BRIEF SURVEY OF EQUITY JUR.* (2d ed.), 4 (1908).

which courts of common law refuse to recognize; but it does not follow that the right thus recognized is properly an equitable right. So courts of equity may treat an act as a violation of a legal right, which courts of common law treat as rightful; but it does not follow that such an act is properly called an equitable tort. . . . For example, (in equitable waste) a court of equity says he has committed waste, while a court of common law says he has not. Either court *may* be wrong, and one of them *must* be; for the question depends entirely upon the legal effect to be given to the words 'without impeachment of waste,' and that cannot depend upon the kind of court in which the question happens to arise. Yet the practical consequence of this diversity of view is, that there is a remedy in equity against the tenant in the case supposed, while there is none at law; and this gives to the act of the tenant the semblance of being an equitable tort. In fact, however, the act is a legal tort, if the view taken by courts of equity is correct, while it is a rightful act, if the view taken by courts of common law is correct."

Since the Chancellors had the upper hand, their view necessarily prevailed.⁶⁸ Of course they did not analyze what they were doing in any such fashion as Langdell's statement, which simply looks back at them from our own time and attempts to fit the result of their work into its logical place in the entire system of justice. At the same time they may have realized that this doctrine was a difference of opinion with the law courts about one narrow issue, and not like the introduction of uses, which superimposed an entire new scheme upon feudal ownership without disputing its existence. At all events, Langdell's explanation accords with the history of waste. In actions under the Statute of Gloucester, the definition of what acts constituted waste was so broad and the penalties were so severe that a tenant could not make reasonable use of his land. The testator employed the phrase "without impeachment of waste" to permit such use without forfeiture of the land and treble damages. The clause was used at least as early as Edward III's time,⁶⁹ and the Statute of

⁶⁸ The equitable rule was made binding upon the law courts by the Judicature Act, § 25 (3).

⁶⁹ 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed.), 123, citing two Year Book references in that reign.

Marlbridge⁷⁰ indicates that it even antedated the writ of waste. Indeed, the complete defense conferred by the clause under that statute may have influenced the law courts to reach the same result under the Statute of Gloucester. At all events, those courts woodenly construed the clause to give the tenant immunity for all waste, however outrageous. Chancery, on the other hand, looked at the substance and saw that the legal privilege and power of the tenant should not go beyond the intention of the settlor, *i. e.*, to permit the use which a reasonable man would make of his own property.⁷¹ Therefore, the tenant was subject to an injunction and accounting for the legal tort of waste when he exceeded the legal defense and power derived from the clause "without impeachment for waste" as properly construed by Chancery.

Thus equity here protects a legal right without a legal remedy, as in the cases of the intervening life-estate and contingent and security interests, but in this instance the situation in the law courts was due to their mistake and not to the unfitness of the legal machinery, for if the clause had been properly construed by

⁷⁰ 52 Henry III, c. 23 § 2 (1267), which declares tenants for years liable to full damage for waste and punishable by fine, if "without special license had by writing of covenant, making mention that they may do it."

⁷¹ Ample judicial support of this view is to be found in the extracts in the following opinions.

Leach, V. C., *Atty. Gen. v. Marlborough*, 3 Madd. 498, 538 (1818): "The grantor meant to confer a full power of temporary enjoyment, without the power of destroying or altering the character of that property, which he had limited over in succession to others."

Turner, L. J., *Micklethwait v. Micklethwait*, *supra*, note 64: "It cannot be presumed that [the settlor] meant the [manor-house] to be denuded of that ornament which he has himself enjoyed. This court, therefore, in such a case protects the trees."

Campbell, C., *Turner v. Wright*, 2 DeG. F. & J. 234, (1860): "The prevention of acts amounting to equitable waste may well be considered as in furtherance of the intention of the testator."

O'Connor, L. J., *Gage v. Piggott*, 53 Ir. L. T. R. 33, 39 (1918, C. A.): "'Without impeachment of waste' means, literally, that the tenant for life shall not be liable for any damage to the inheritance permitted or wrought by him, however reckless, extravagant, or wanton. . . . It was felt, even in the earliest days, that a power of this kind, unlimited as it was, and liable to gross abuse, was not according to the real intention of the instrument creating the estate. It was, indeed, obviously repugnant to the intention of the grantor, who, in carving out the life-estate and the other estates in remainder might be presumed to be as much concerned for the preservation of the inheritance for the remainderman as for the limited enjoyment of it by the life-tenant. Accordingly the courts of equity proceeded to give the grants . . . a construction more consonant with the real intentions of the grantor."

the law judges the writ of waste could have given the remainderman in fee a suitable remedy for unreasonable user.

In the various torts considered hitherto, the law courts had developed the tort before equity acted. In a second group, a different situation is presented. Several cases of the same type arise at law so that a legal problem is clearly presented; but before the limits of the new tort are thoroughly worked out by many decisions in the law courts, injunctions are sought against the same type of conduct, perhaps with equal or greater frequency. Examples of such situations are interference with the plaintiff's access to the purchasing or labor markets through boycotts and picketing,⁷² and the performance with an improper motive of acts not normally regarded as tortious.⁷³ These torts have developed *pari passu* at law and in equity. The limits suggested in actions for damages may have been persuasive in suits for injunctions, but the converse is equally true. Neither court has a superior power to define the tort. Even if in the end both law and equity adopt the same requisites of the cause of action and the same defenses, these are the product of their joint action. Equity does not follow the law court but co-operates with it.

Under such circumstances a particular new tort is by no means sure to be defined alike in actions for damages and injunction suits. Even when the same court administers both types of relief with a united bar and a single series of reports, two distinct lines of precedents may come into existence without continuous cross-citation and judicial perception of the affinity between them. Injunctions may be granted on the authority of prior injunction cases with no reference to the dismissal of actions for damages in similiar situations. Such a differentiation is especially probable when justice calls for an injunction on facts for which damages are unsuitable, or when equitable analogies may be in-

⁷² *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551 (1868), in equity. *Allen v. Flood*, [1898] A. C. 1, damages; *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077 (1896) in equity; *Martell v. White*, 185 Mass. 255, 69 N. E. 1085 (1904) at law.

⁷³ *Christie v. Davey*, [1893] Ch. 316, in equity; *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946 (1909), damages. See 37 HARV. L. REV. 143 (1923). The decisions cited in this and the preceding note are, of course, merely illustrative of a far greater number.

voked which are not ordinarily considered in a law court. Two conspicuous examples of this divergence may be considered.

Causing breach of contract. The liability of the third party at law began in 1853 and injunction suits go back at least to 1903.⁷⁴ Kentucky⁷⁵ and other states,⁷⁶ however, have limited relief by damages to cases where the defendant by coercion or deception procured the violation of the contract against the will of the defaulting promisor. Intentional interference with the contract is not enough without some such element of improper pressure. Yet the Kentucky court has granted an injunction where damages would not lie against the third party.⁷⁷ In this case the defaulting promisor was insolvent so that an action at law against him for breach of contract was an inadequate remedy. Other equity cases go even further and enjoin third parties who did not intend to injure the plaintiff,⁷⁸ or who did not even procure the breach, but wish to take advantage of it after it is committed by receiving from the promisor the property which he had agreed to deliver to the plaintiff.⁷⁹ It is not likely that in the last situation any jurisdiction would give damages. Two reasons for this refusal of equity to follow the law courts may be suggested. First, there are certain practical reasons for denying damages. The plaintiff has a right to full compensation for his loss from the promisor, and the liability of the outsider for the same breach creates risks of a double recovery which the legal machinery is not entirely fitted to supervise since it cannot join all the parties in one suit. Again, it seems a clog on competition to force money payments from the third party whose connection with the breach is somewhat remote and who probably has no right of reimburse-

⁷⁴ *Lumley v. Gye*, 2 El. & Bl. 216 (1853); *Glamorgan Coal Co. v. South Wales Miners' Federation*, [1903] 2 K. B. 545 (C. A.). See the references in 39 HARV. L. REV. 749 (1926).

⁷⁵ *Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57 (1891); *Bourlier v. Macauley*, 91 Ky. 135, 15 S. W. 60 (1891).

⁷⁶ NIMS, UNFAIR COMPETITION (2d ed.) §§ 167, 173.

⁷⁷ *Friedberg v. McClary*, 173 Ky. 579, 191 S. W. 300 (1917).

⁷⁸ *Niles-Bement-Pond Co. v. Iron Molders' Union*, 246 Fed. 851 (D. C. Oh., 1917). See 31 HARV. L. REV. 1017 (1919).

⁷⁹ *Montgomery Enterprises v. Empire Theatre Co.*, 204 Ala. 566, 86 So. 880 (1920); *Westinghouse v. Diamond*, 288 Fed. 121 (Del., 1921). See 21 COL. L. REV. 490 (1921); 31 HARV. L. REV. 1018, n. 6 (1919).

ment against the promisor, especially as current business ethics are such that he may not have realized when he induced the breach that he was committing an actionable wrong. Neither reason applies to an injunction suit. It forestalls liability to damages on the part of anybody, and it warns the third party in advance of his action that it is wrongful. Secondly, the equity court is influenced by related kinds of equitable relief, such as the enforcement of negative covenants for personal service in which a third party aiding in the breach is frequently made a co-defendant,⁸⁰ specific performance of land contracts against a purchaser with notice,⁸¹ and the doctrine of equitable servitudes in land, which may naturally be extended to chattels.⁸² Trust conceptions also play a part. These analogies would be unlikely to occur to court or counsel in a suit for damages. Because of these two factors, injunctive relief is likely to continue to outrun substitutional redress. In some of these cases the wrong enjoined seems to be a legal tort for safeguarding which the legal machinery is unfitted, though in others the plaintiff's right may best be considered purely equitable on the analogy of servitudes on land which lie within the exclusive jurisdiction.⁸³

Removal of cloud on title. The sound basis of this equitable remedy is a present injury to the marketability of the plaintiff's title caused by the defendant's claim of an interest in the property.⁸⁴ Inasmuch as the plaintiff's title in such a proceeding is

⁸⁰ *Lumley v. Wagner*, 1 DeG. M. & G. 604 (1852).

⁸¹ See Harlan F. Stone, "The Equitable Rights and Liabilities of Strangers to a Contract," 18 COL. L. REV. 291 (1918). The property element in *Montgomery Enterprises v. Empire Theatre Co.*, *supra*, n. 79, was emphasized by the court.

⁸² See *Lord Strathcona S. S. Co. v. Dominion Coal Co.*, [1926] A. C. 108 (J. C.); "Equitable Servitudes in Chattels," 32 HARV. L. REV. 278 (1918); *Lorillard Co. v. Weingarden*, 280 Fed. 238 (W. D. N. Y. 1922), noted in 36 HARV. L. REV. 107 (1922); 38 HARV. L. REV. 749, 752 (1925). The denial of relief in cases of restrictions on resale and use may be rested on the scope of a patentee's right or on restraint of trade without negating the existence of servitudes on chattels.

⁸³ In *Lorillard Co. v. Weingarden*, *supra*, n. 82, goods subject to a restriction against resale in the United States were sold by the promisor abroad, and passed through mesne purchasers abroad to the defendant, who was about to resell in this country. Thus the promisor fully performed the contract and the defendant's liability cannot rest on a tort like *Lumley v. Gye*.

⁸⁴ D. C. Howard, "Bills to Remove Cloud on Title," etc., 25 W. VA. L. Q. 4, 10 (1917); CLARK, EQUITY, § 414 (1919); Dull's Appeal, 113 Pa. 518 (1886).

usually legal,⁸⁵ the *jus disponendi* which is protected is a legal right, one of the bundle of rights which taken together constitute his title, others being the rights to enjoy, to exclude other persons, to devise or bequeath. The injury to this right is, therefore, a legal tort remedied in equity. On this analysis, the corresponding remedy at law for the tort is an action for slander of title, so called, but better classified as one kind of disparagement of property.⁸⁶ But the limitations on the legal remedy when the disparagement of title is by a rival claimant⁸⁷—the situation ordinarily comparable to the equitable remedy—are such as to prevent an action at law in many cases where the equitable remedy is granted. At law the rival claimant is privileged unless he does not believe in the validity of the claim of the title which he asserts or unless though believing therein he is actuated by a wrongful motive, *i. e.*, some motive other than the protection of his own interest or reasonable warning to persons liable to purchase from the plaintiff.⁸⁸ Furthermore, the plaintiff must prove special damage.⁸⁹ Equity does not impose these limitations upon liability for two reasons similar to those affecting the divergence as to causing breach of contract. First, the machinery is different at law and in equity. It would be harsh to impose damages for an amount conjectured by the jury where none are actually proved. And it would be still more unjust to deter a *bona fide* claimant from asserting his supposed title by the fear of heavy pecuniary loss if he should prove mistaken. Neither reason exists in equity, for no damages are there imposed and the claimant is only penalized for the assertion of his claim through contempt proceedings after an adjudication of its invalidity. The injury to the plaintiff's *jus disponendi* may be just as great from a *bona fide* claim as from a

⁸⁵ It may, however, be equitable. Howard, 25 W. VA. L. Q. 122 (1917); 5 POMEROY, EQ. JUR. (4th ed.) § 2152.

⁸⁶ Jeremiah Smith, "Disparagement of Property," 13 COL. L. REV. 13, 121 (1913).

⁸⁷ Smith, *op. cit.*, *supra*, n. 86, shows that the privilege does not exist when the disparagement is by a stranger. Pound's edition, AMES & SMITH'S CASES ON TORTS, 813 n.

⁸⁸ Smith, *op. cit.*, *supra*, n. 86, at page 30 ff.; Halsey v. Brotherhood, 15 Ch. D. 514, 19 Ch. D. 386 (1881).

⁸⁹ Smith, *op. cit.*, *supra*, n. 86, at 121 ff.; Pound, *op. cit.*, *supra*, note 87, 816 n.; Malachy v. Soper, Bing. N. C. 371 (1836).

pretended claim, but fairness to the defendant requires a distinction as to damages. Equity, however, can deal with both cases by extinguishing the claim altogether, and even a *bona fide* defendant can not object to this being done after he has failed to establish it. In other words, the claimant is given a privilege of asserting his supposedly valid claim for the sake of protecting his interest, but the privilege ceases with the reason for it. In equity it is unnecessary to permit it as a defense since the claimant's interest is there adequately protected through his opportunity to establish the validity of his claim. A judgment for damages at law would penalize him for acts done when he supposed his claim to be good, but the decree in equity merely relates to events after it has been decided to be bad. Secondly, the equity court can use the analogy of a purely equitable proceeding, cancellation of instruments *quia timet*. This greatly influenced the development of the equitable remedy, and usually no attention was paid by judges to the question whether a legal action could be brought or not. However, this analogy though helpful to the equitable jurisdiction also served to obscure its real basis, present injury to marketability, and has led many courts to deny removal of a cloud where there is no danger of the defeat of the applicant for relief in a future ejectment action by the claimant.⁹⁰ In such states equity fails to follow the law in a most unfortunate way, for it denies relief even where the legal action of disparagement of title could be brought and would be clearly inadequate.

In a third group of torts, comprising several types of interference with advantageous relations and other injuries to business,⁹¹ relief is almost always sought in equity, and the limits of tort liability have usually been worked out in suits for injunctions. As against innumerable suits in equity to enjoin the disclosure of trade secrets, a handful of actions at law have been found in England and New York,⁹² most of them based on an

⁹⁰ Howard, 25 W. VA. L. Q. 110 ff. (1917); 5 POMEROY, EQ. JUR. (4th ed.) § 2155 ff.

⁹¹ Examples of such torts are collected in CHAFFEE, CASES ON EQUITABLE RELIEF AGAINST TORTS, 81 ff. (1924); NIMS ON UNFAIR COMPETITION (2d ed.) (1917).

⁹² Smith v. Dickenson, 3 Bos. & P. 630 (1804) express contract; Robb v. Green [1895] 2 Q. B. 315 (C. A.), contract; Tode v. Gross, 127 N. Y. 480,

express contract not to communicate the secret so that these do not show any tort liability at law. In trade-marks the early actions at law in the nature of deceit⁹³ have long been superseded by suits in equity, although some remedy at law may still exist.⁹⁴ Only one case of an action at law for unfair competition through misappropriation of a secondary meaning has been noted.⁹⁵ The same is true of the protection of uncopyrighted literary property, with the possible exception of the blind advertisement case,⁹⁶ where no liability was held. In all these torts equity makes use of trust analogies. Under such circumstances, it is a pure feat of the imagination to declare that equity is following the law. Perhaps the courts tacitly assume that wherever an injunction is granted an action for damages would lie, but few plaintiffs have cared to ascertain whether this be true or not. The most that we can say is, that a court of equity decides the existence of a legal tort before passing on questions of specific relief. In other words, the law which the court follows is its own law and not that of any law court.

This being so, equity would not be likely to alter its course and deny injunctions just because an action at law for damages should be declared impossible. For example, in a topic closely related to interests of personality, the wrongful expulsion of a

28 N. E. 469 (1891) express contract; *Roystone v. Woodbury Dermatological Institute*, 67 Misc. Rep. 265, 122 N. Y. Supp. 444 (1910), tort. The last case is the only real authority for tort liability for damages. Courts which base trade secret injunctions upon a trust could hardly create such a liability at law. Under the Judicature Act or Codes in this country, damages might be given in lieu of or in addition to an injunction without necessarily affirming liability at law. See *Hammer v. Baines*, 26 How. Pr. 174 (1863), contract.

⁹³ See the discussion of the various reports of *Southern v. How*, (*circa* 1618) by F. I. SCHECHTER, *HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADEMARKS*, 6 ff. (1925). Other early cases at law were *Cabrier v. Anderson* in 1777 under a penal statute, stated by SCHECHTER, 137; *Singleton v. Bolton*, 3 Doug. 293 (1783), *semble*; *Sykes v. Sykes*, 3 B. & C. 541 (1824). Later English and American cases are collected in SCHECHTER, 142-145. Only one of these is later than 1870.

⁹⁴ *Van Raalt v. Schenck*, 159 Fed. 248, 251 (C. C. Wis., 1908). Injunction denied against trade-mark infringement which had ceased to exist, and refusal to retain jurisdiction for the purpose of an accounting. Quarles, J. "If complainants have suffered damage by act of defendant, there is a complete and adequate remedy at law." The federal Trade-Mark Act of Feb. 20, 1905, § 17, recognizes actions at law.

⁹⁵ *Marsh v. Billings*, 7 Cush. 322 (1851).

⁹⁶ *Westminster Ldy. Co. v. Hesse Envelope Co.*, 174 Mo. App. 238, 156 S. W. 767 (1913).

member from an unincorporated association, the jurisdiction of equity to grant an injunction has long been asserted in England if there is an alleged property interest in the form of a potential right to share in the association's assets on dissolution.⁹⁷ In 1915, it was held that the expelled member could not recover damages from the association, since he would be suing himself among other members, or from the committee, who were for a similar reason his own agents.⁹⁸ Yet this decision has not prevented the English courts from continuing the jurisdiction to grant injunctions in this very case and in later cases.⁹⁹ In the United States, the equitable jurisdiction against wrongful expulsions is usually based on breach of an alleged contract,¹⁰⁰ but the same technical objection exists to recovery at law. It has been held in West Virginia and Alabama that the association is not liable for damages,¹⁰¹ though the West Virginia court has stated that the individual members may be held *ex delicto*.¹⁰² Here again, equity protects a legal right where the legal machinery is unsuited to afford a remedy.

In like manner, the Supreme Court of the United States in *International News Service v. Associated Press*,¹⁰³ rejected the argument that equity was not following the law¹⁰⁴ and enjoined

⁹⁷ Pound, "Equitable Relief against Defamation and Injuries to Personality," 29 HARV. L. REV. 640, 677 (1916); Dawkins v. Antrobus, 17 Ch. D. 615 (1881).

⁹⁸ Kelly v. National Society of Printers' Assistants, 84 L. J. K. B. (N. S.) 2236 (C. A., 1915).

⁹⁹ Rex v. Cheshire County Court Judge, [1921] 2 K. B. 694, 709 (C. A.).

¹⁰⁰ Pound, *op. cit.*, note 97, *supra*, 680.

¹⁰¹ Simpson v. Grand Int. B. of L. Engrs., 83 W. Va. 355, 98 S. E. 580 (1919); Grand Int. B. of L. Engrs. v. Green, 206 Ala. 196, 89 So. 435 (1921), modified by statute, 210 Ala. 496, 98 So. 569 (1923). See 20 MICH. L. REV. 245 (1921).

¹⁰² Simpson v. Grand Int. B. of L. Engrs., *supra*, point 7 of syllabus by the court. On the facts no wrong was held to exist. If point 7 be sound, it is arguable that the equitable relief against the association is merely a procedural departure from the law in describing the various members under a general name, and is only a representative suit like *Am. Steel & Wire Co. v. Unions*, 90 Fed. 598 (C. C., Ohio, 1898).

¹⁰³ 248 U. S. 215, 240 (1918). See the valuable note in 13 ILL. L. REV. 708 (1918); also Chafee, "Progress of the Law—Equitable Relief against Torts," 34 HARV. L. REV. 388, 408 (1920).

¹⁰⁴ Brandeis, J., dissenting, at 248 U. S. 215, 262, said: "The case presents no elements of equitable title or breach of trust. The only possible reason for resort to a court of equity in a case like this is that the remedy which the law gives is inadequate. If the plaintiff has no legal cause of action, the suit necessarily fails. *Levy v. Walker*, L. R. 10 Ch. D. 436, 449."

the defendant news service from taking news items, gathered by the plaintiff service, from bulletin boards and headlines and publishing the pirated news in distant cities before the plaintiff's members there could get the same items into their newspapers. Mr. Justice Pitney said:

"The underlying principle is much the same as that which lies at the base of the equitable theory of consideration in the law of trusts,—that he who has fairly paid the price should have the beneficial use of the property. Pom. Eq. Jur., Sec. 981. It is no answer to say that complainant spends its money for that which is too fugitive or evanescent to be the subject of property. That might, and for the purposes of the discussion we are assuming that it would, furnish an answer in a common-law controversy. But in a court of equity, where the question is one of unfair competition, if that which complainant has acquired fairly at substantial cost may be sold fairly at substantial profit, a competitor who is misappropriating it for the purpose of disposing of it to his own profit, and to the disadvantage of complainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property. It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience."

Summing up the results of this survey, we have found that in many kinds of torts the court of equity defines the liability for itself without any prior determination thereof at law, and that in at least four classes of cases where the law courts have denied a remedy, injunctions have issued to protect a legal right, *viz.*, (1) several situations in waste; (2) causing breach of contract without fraud or coercion, which is not actionable at law in some states; (3) removal of cloud on title where an action for slander of title will not lie; (4) wrongful expulsion from unincorporated associations. Occasionally, the refusal of equity to

In *Levy v. Walker*, the Court of Appeals held that after the dissolution of a partnership, the purchaser of the goodwill could not be restrained by a former partner from using the firm name. Bramwell, L. J., said: "An injunction is granted to prevent damage, or the violation or the infringement of a right. Now, I cannot see that any right is violated, and I cannot conceive a possible case of damage from what has been done. It seems to me that no action could possibly lie at common law for that which is made the subject of

follow the law court arises because the law court is wrong as in equitable waste, or because the equity court is wrong as in refusing to remove a cloud on title caused by an instrument known by the defendant to be void on its face. In most cases, however, the differentiation in scope of liability is due to an inherent difference in the nature of the machinery available to the two courts, and the injunction is fitted to cope with conduct for which the action for damages is too rigid or too harsh upon the defendant.

IV

This same conclusion as to differences in the fitness of remedies applies even more strongly to the problem of protection of interests of personality. As Dean Pound has shown,¹⁰⁵ serious practical objections arise to the award of damages for the subjective mental suffering caused by invasions of privacy or affronts to personal honor. Even where the requisites of slander or libel exist, jurymen's conjectures as to the proper compensation for the plaintiff's reputation, where actual damage is not proved, have always been unsatisfactory. When aroused they may give an excessive verdict, but in this country their frequent habit is to award a few cents after very expensive litigation. The law courts have naturally been reluctant to create similar possibilities of guesswork in such new situations as the undesired correspondence case or unauthorized publication of a photograph. They might simply be opening new fields for imposture and speculative litigation. It would be particularly harsh to give damages for past invasions of privacy and similar acts committed without definite realization that they were objectionable to the plaintiff. No such objections exist to the injunction and other forms of specific relief like the Continental action for honorable amends.¹⁰⁶ Since no money is recovered, a plaintiff will not be tempted to sue unless genuine injury exists, and the defendant suffers nothing from ceasing the annoyance or publishing a retraction after the

this injunction." Here there was clearly no legal right, so that the statement as to want of legal remedy is not squarely opposed to the view taken in this article.

¹⁰⁵ "Interests of Personality," 28 HARV. L. REV. 359-362, 452 (1915).

¹⁰⁶ Pound, *op. cit.* n. 105, p. 364 with references.

plaintiff has made his objection plain by suing. Mr. E. V. Abbot says: ¹⁰⁷

"There is no reason in the nature of things why equity should not interfere to prevent injury to feelings. Pecuniary damages cannot be proved, and the temptation to purely speculative litigation is therefore absent. Such being the case, if a plaintiff feels himself so much aggrieved by threatened or continued acts of the defendant as to lead him to incur the expense and annoyance of an actual litigation, we may be certain that he regards the injury as substantial. If under these circumstances he can in fact prove that continued injury to his feelings is threatened or continued, and the defendant can offer no rational excuse for continuing it, equity has no rational excuse to offer for denying the easy aid of its injunctive process."

Therefore, once equity decides to protect interests of personality, it should do so without following the law and denying relief where actions for damages do not lie. Fortunately, those liberal courts which have overcome the objection of want of property do not insist on the existence of a legal remedy. Thus the Texas court in *Hawkes v. Yancey* ¹⁰⁸ granted an injunction to a former mistress of the defendant after she had voluntarily terminated illicit relations, "restraining him from annoying the plaintiff in any manner, . . . from talking to the plaintiff in any manner, . . . from telling to any employer of plaintiff about her relations or associations with this defendant, and . . . from doing or causing the plaintiff any physical or bodily injury, or threatening to do her any physical or bodily injury." Many of the acts thus enjoined, as elaborated in the opinion, do not seem remediable at law, and the court nowhere inquires whether an action for damages would lie but grants relief because of the serious injury to the plaintiff's sensibilities. Similarly, the Georgia court enjoined an invasion of privacy, although no action for damages had previously been held to lie.¹⁰⁹ It is true that this

¹⁰⁷ "Justice and the Modern Law," 32 (1913), quoted by Pound, *loc. cit.*

¹⁰⁸ 265 S. W. 233 (Tex. Civ. App., 1924), noted by F. C. Woodward in 19 ILL. L. REV. 679 (1925), Tex. Rev. Civ. Stat. (1925), art. 4642, sub-div. 1, made it easier for the court to enjoin those injuries to personality for which damages were recoverable, but this statute did not aid the relief against some injuries not actionable at law.

¹⁰⁹ *Pavesich v. New England M. L. Ins. Co.*, 122 Ga. 190, 50 S. E. 68 (1905).

decision and the New York privacy statute¹¹⁰ recognize a right to damages, but this should not be a prerequisite to injunctive relief. Finally, a New York court has intimated that an injunction would be granted against undesired correspondence if it continued after the plaintiff had expressed her objection to receiving it,¹¹¹ although as we have seen,¹¹² no action at law lies.

An argument for a somewhat independent development of legal rights in equity is found in the related field of specific performance of contracts, where the former rigid rules of the law courts as to dependent promises were modified under the influence of different rules in Chancery, and the technical legal doctrine of consideration may in future show the effect of cases granting specific performance of what are in fact executory gifts.¹¹³ Here, as in torts, the legal right is defined differently than at law.

Two other controversial tort situations may now be considered.

First, may a charitable corporation be enjoined from continuing a tort, for which it could not be made liable in damages? An affirmative answer seems reasonable. The immunity at law rests on the ground that the funds have been donated for the maintenance of the charity and ought not to be diverted to paying the plaintiff. Whatever we may think of this argument, it does not apply to an injunction which saves the plaintiff from loss without taking any money from the charity. Several cases have expressed a readiness to enjoin in the absence of liability at law.¹¹⁴ Similar reasoning justifies injunctions against torts by municipal corporations for which damages are not recoverable.¹¹⁵

¹¹⁰ N. Y. Civil Rights Law, §§ 50, 51.

¹¹¹ *Williams v. O'Shaughnessy*, 172 N. Y. Supp. 574 (1918), noted in 19 COL. L. REV. 163 (1919).

¹¹² *Supra*, notes 17, 18.

¹¹³ *Roscoe Pound*, "Consideration in Equity," 13 ILL. L. REV. 667, 679 ff. (1919).

¹¹⁴ *Deaconess v. Bontges*, 104 Ill. App. 484, 491 ff. (1902), *affd.* 207 Ill. 553, 69 N. E. 748 (1904); *Herr v. Lunatic Asylum*, 97 Ky. 458, 30 S. W. 971 (1895); *Kestner v. Homeopathic*, 245 Pa. 326, 91 Atl. 659 (1914); *Love v. Nashville*, 146 Tenn. 550, 243 S. W. 304 (1921). See 22 COL. L. REV. 748 (1922); 7 MINN. L. REV. 57 (1922).

¹¹⁵ See *Lefrois v. Monroe*, 162 N. Y. 563, 57 N. E. 185 (1900); *Kirk v. Board of Health*, 83 S. C. 372, 383, 65 S. E. 387, 391 (1909); 23 L. R. A. (N. S.) 1188.

Secondly, may the plaintiff enjoin the enforcement of an unconstitutional criminal statute which would seriously injure his property, but under which he could not be punished?

In *Milton Dairy Co. v. Great Northern Ry. Co.*¹¹⁶ a statute made it criminal to transport cream more than sixty-five miles except in refrigerator cars, unless it had been previously pasteurized. A creamery, which alleged that the statute would ruin its business and was discriminatory in violation of the Minnesota and United States Constitutions, sought to enjoin railroad and express companies from complying with the act and to enjoin the Attorney General from prosecuting these transportation companies. Here the plaintiff had no legal remedy whatever, since it could not violate the statute and then test it in a criminal proceeding. Yet, if the statute was invalid, the Attorney General was unlawfully depriving the plaintiff of access to sources of supply except at unwarranted expense. This would be an interference with an interest of substance of the plaintiff, as truly as a boycott or other intimidation exerted on third parties. Consequently, it seems a legal tort for which there was no legal remedy because the legislature did not desire to make the prosecutor's net too large. The analogies of equitable waste, cloud on title, etc., would justify an injunction here if no other objections existed. Relief was denied largely because of the policy against enjoining criminal prosecutions, although the plaintiff's indirect relation to the statute was emphasized by the court.

A contrary result was recently attained by the United States Supreme Court in the *Oregon School Case*.¹¹⁷ The statute provided that any parent or guardian of a child of school age should be guilty of a misdemeanor upon failure to send the child to a public school. The act was not to become effective for two years. A Roman Catholic parochial school and a military academy filed a bill against the governor and other state officers to have the act declared unconstitutional under the Fourteenth Amendment

¹¹⁶ 124 Minn. 239, 144 N. W. 764 (1914), noted in 27 HARV. L. REV. 668 (1914).

¹¹⁷ *Pierce v. Society of the Sisters of the Holy Names*, 268 U. S. 510, 45 Sup. Ct. 571 (1925), noted in 39 HARV. L. REV. 266 (1925); affg. 296 Fed. 928 (D. Ore., 1924).

and to enjoin the defendants from insisting on its validity at any time. The bill alleged that parents were already withdrawing their children from the plaintiff schools, or were refusing to contract for their future instruction, so that the schools would have to close before the act took effect. A motion to dismiss the bill for want of equitable jurisdiction was denied, and a preliminary injunction was granted. Although the parents and guardians would eventually have a remedy at law by defending criminal prosecutions, this would not save the plaintiffs' property because even if some parents should care to contest the statute the business of the schools would already be ruined. The schools had no remedy at law, although the injury to them was, as the Supreme Court recognized, analogous to interference by boycotts, picketing, etc., with contracts or with the freedom of customers of a plaintiff.¹¹⁸ In this case as in some of the classes already considered in this article, equity was aided in going beyond the law courts by the use of a purely equitable principle, the avoidance of multiplicity of suits, which is frequently invoked in the United States Courts by plaintiffs prosecuted under an alleged unconstitutional statute.¹¹⁹ The Minnesota court in the dairy case took a different view of this matter.

Two further aspects of the *Oregon School Case* may be mentioned. Although the person prosecuted has a legal defense in criminal proceedings, nobody has an action for damages against the state. It is, therefore, particularly desirable to forestall a wrong for which no compensation could be given. The Eleventh

¹¹⁸ 268 U. S. at 536. The analogy is particularly clear in *American Mercury v. Chase* (U. S. D. C. Mass., Equity No. 2541, April 14, 1926), in which Morton, J., granted a temporary injunction to publishers of a periodical against members of The New England Watch and Ward Society, who had notified booksellers that prosecution would follow if a certain issue of the periodical was sold, which the defendants considered obscene, and avowed their intention of taking the same course as to future issues which should seem to them objectionable. The practical effect was to deter the booksellers from selling the issue in question. They would not run the risk of defending a prosecution and the Mercury could not do so, since it was not selling in Massachusetts, yet its circulation was seriously affected. The decision was based on the authority of boycott cases, but the situation resembles the Oregon School Case except that the defendants were private persons, not prosecuting officials, and the issue was the construction and not the invalidity of the law.

¹¹⁹ *Truax v. Raich*, 239 U. S. 33 (1915); *Hammer v. Dagenhart*, 247 U. S. 251 (1918).

Amendment, which prevents an action at law against the state does not apply to injunctions against the enforcement of an invalid statute by defendant officials.¹²⁰

On the other hand, persons not within the scope of a criminal statute ought not to be permitted to test its validity in equity unless it subjects them to very great injury. Indeed, this might be said of all such collateral attacks on the constitutionality of legislation. There should be a real danger of irreparable damage, or else the ordinary processes of the criminal law should be left to take their course. Lord Dunedin remarks,¹²¹ "No one can obtain a *quia timet* order by merely saying '*Timeo*'; he must aver and prove that what is going on is calculated to infringe his rights." On this ground it is possible to distinguish from the *Oregon School Case* the decision in *Hobbins v. Hannan*.¹²² The Wisconsin rating bureau asserted statutory powers to regulate the form of policies issued by insurance companies. Although the companies complied with the law, the plaintiff, an insurance agent, sued to enjoin the enforcement of the law as impairing freedom of contract. The Supreme Court of Wisconsin refused relief because if the act was unconstitutional it was the companies whose freedom was denied, and they were not objecting. The plaintiff was said to suffer no private injury. This would hardly be true if the companies were regulated in such a way as to put the plaintiff out of business. If, for instance, the law allowed the state to take over all insurance in Wisconsin, the situation would closely resemble the *Oregon School Case*. In fact, the plaintiff merely showed that his business was hampered by the new types of policies. Furthermore, in the *School Case* there was great need to allow the schools to sue because the parents were not in a financial position to contest the statute and in any event could not do so before the schools were ruined. In the insurance

¹²⁰ *Ex parte Young*, 209 U. S. 123, 149 (1908). Cf. *Hoffman v. M'Elligott*, 259 Fed. 525, affg. *ibid.*, 322 (C. C. A., 2d, 1919), noted in 19 COL. L. REV. 506 (1919); 18 MICH. L. REV. 159 (1919).

¹²¹ *Atty. Gen. v. Ritchie Contracting & Supply Co.*, [1919] A. C. 999, 1005 (J. C.). See *Fletcher v. Bealey*, 28 Ch. D. 688 (1885); CHAFEE, CASES ON EQUITABLE RELIEF AGAINST TORTS, 162, "Note on Imminence of the Tort." See also the dissenting opinion of Brandeis, J., in *Pennsylvania v. West Virginia*, 262 U. S. 553, 611 ff. (1923), noted in 37 HARV. L. REV. 893 (1924).

¹²² 186 Wis. 284, 202 N. W. 800 (1925).

case the companies were amply able to assert their rights if they wished to do so and could sue at once. Similar considerations may apply to the Minnesota dairy case.

V

Before concluding, it would be well for me to reply to one question which is sure to be asked. Why all this trouble to distinguish throughout the article between legal and equitable rights, and to insist that even when equity does not follow the law it is enjoining a legal tort? It may be thought that the distinction is of no practical importance today with the single system of courts, and that the situations I have discussed where relief is given by injunction with no liability for damages may as well be classed with trusts, redemption of mortgages, and so on, without all this effort to demonstrate that they are torts. The distinction is, however, much more than theoretical. Of recent years, the exclusive jurisdiction of equity has shown little capacity for growth.¹²⁸ A single instance will suffice, the failure to relieve adequately against forfeiture clauses in contracts for the purchase of land by instalments where time is expressly made of the essence. The analogy to mortgages is clear, the vendor having only a security interest, but equity does not apply it, although the economic pressure on the workman buying a small house lot is just as great as that on borrowers in the days when Chancery first disregarded the clear terms of a mortgage, and just as certain to force purchasers to enter into disadvantageous agreements. The tendency now is to leave such relief to legislation. On the other hand, the law of torts is today a conspicuous growing point in the administration of justice. Once bring a case within that field, and new social needs are much more likely to receive judicial recognition.

The main purpose of this article, then, is to show that the law of torts has just as much precedent for growth in suits for specific relief as in actions for damages, and that differentiation between the two in the scope of liability is amply justified where

¹²⁸ Roscoe Pound, "*The Decadence of Equity*," 5 COL. L. REV. 20 (1905).

the reasons for limitations on substitutional redress do not in fact apply to injunctions. Our single court of law and equity is like a workman with numerous tools lying before him. For some tasks he may want to use either the hard blows of the action for damages or the flexible injunction, according to circumstances. For other jobs, like the suppression of battery, the injunction is wholly unfitted, and only damages or prosecution will serve.¹²⁴ There remains, however, delicate work where damages are of no use and bound to do harm, and yet an injunction would produce admirable results. Under such circumstances, no sound argument exists for a refusal to employ the appropriate tool, merely because he can not use another tool which does not meet the need at all. So long as judges are not expressly prohibited from using such a legitimate remedy as the injunction for a purpose which it will effectually obtain, the non-existence of an action for damages should be immaterial. As it is the function of a factory to produce goods, so it is the function of courts to produce justice, and they should feel free to use for that object all or any of the means which long custom and legislation have placed at their disposal.

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¹²⁴ For other instances, see Brandeis, J., dissenting, *International News Service v. Associated Press*, 248 U. S. 215, 266 (1918).